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SUPREME COURT OF THE UNITED STATES

LOIS E. HILTON FORD *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-5570. Decided January 19, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The issue here is whether it is consistent with the Federal Magistrates Act for a District Court to delegate jury selection to a magistrate. In this case, petitioner was convicted by a federal jury on the felony charge of stealing government property. A United States Magistrate presided over the selection of the jury which, despite the relatively routine nature of the charges, took about four hours and was not free of difficulty. Neither the government nor defense counsel expressly consented or objected to the magistrate's presiding over the voir dire proceedings. On appeal, petitioner argued that the District Court violated the Federal Magistrates Act, 28 U. S. C. §§ 631-639, by allowing the magistrate to preside over jury selection. A panel of the Fifth Circuit rejected this argument. *United States v. Ford*, 797 F. 2d 1329 (CA5 1986), cert. denied, — U. S. — (1987).

The case was accepted for rehearing *en banc*, and in a split decision the full court affirmed, though on other grounds. It ruled that the Act does not grant a District Court the power to delegate jury selection to a magistrate as an "additional duty" under 28 U. S. C. § 636(b)(3), and that the opposite construction of this section would pose "grave constitutional issues." *United States v. Ford*, 824 F. 2d 1430, 1435 (CA5 1987) (*en banc*). Nonetheless, it affirmed the conviction because petitioner had failed to object to this procedure at trial and the violation did not amount to plain error because it did not render the trial fundamentally unfair. Judge Jolly concurred in the result, concluding that under the Act and the Constitution a magistrate may conduct voir dire at a jury

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trial unless the defendant objects. *Id.*, at 1439. Judge Rubin dissented, joined by three other judges, concluding that it does not violate either the Act or the Constitution for a magistrate to conduct the voir dire proceedings in a criminal trial. *Id.*, at 1440-1448.

If the decision below is incorrect, and this use of the magistrate violates either the Act or the Constitution, then it is not obvious that this violation can be dismissed under the "plain error" doctrine. And the position of the Fifth Circuit on this issue conflicts with two decisions of the Ninth Circuit. *United States v. Peacock*, 761 F. 2d 1313, 1317-1319 (CA9), cert. denied, 474 U. S. 847 (1985); *United States v. Bezold*, 760 F. 2d 999, 1001-1003 (CA9 1985), cert. denied, 474 U. S. 1063 (1986). See also *United States v. Rivera-Sola*, 713 F. 2d 866, 872-873 (CA1 1983) (dictum). The split among the Circuits on this issue warrants our granting certiorari.